Tat Sang Sdn Bhd v Saw & Co

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D6–24–316 OF 2001
MOHD HISHAMUDIN J
28 MARCH 2002

Civil Procedure *— Discovery — Application for production of documents — Defendant not a wrongdoer — Defendant no connection with wrongdoing — Whether plaintiff could obtain the special audit report of the plaintiff company*

The plaintiff company, Tat Sang Sdn Bhd ('Tat Sang'), was placed under receivership by Affin Bank Bhd. The defendant had been the auditor for Tat Sang since 1998 and had done a special audit on Tat Sang for the period ending 30 June 2001. When Tat Sang was placed under receivership in October 2001, the receivers and managers wrote to the defendant/auditor for a copy of the special audit report but the defendant refused, stating that the report was confidential and that the receivers and managers were not entitled to the same. Thus, the receivers and managers sought an order that the defendant provide all documentation, working papers and notes pertaining to the audited accounts for the periods ending 30 July 1998, 30 July 1999 and 30 July 2000 and the special audit for the period ending 30 July 2001. The application by the plaintiff was based on the principle in *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1973] 2 All ER 943.

Held, dismissing the application with costs:

(1) The *Norwich Pharmacal* principle, adopted by the Supreme Court in *First Malaysia Finance Bhd v Dato' Mohd Fathi bin Haji Ahmad* [1993] 2 MLJ 497, stated that 'discovery to find the identity of a wrongdoer is available against anyone whom the plaintiff has a cause of action in relation to the same wrong. It is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession.' (per Lord Reid in *Norwich Pharmacal*) (see p 461D–E). The exception is that if through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, whilst he may incur no personal liability, yet he is under a legal duty to assist the person who has been wronged by giving him full information and in making disclosure of the identity of the wrongdoers (see p 461E–F).

(2) The nature of the plaintiff's application was not within the ambit of the *Norwich Pharmacal* principle. It had not been established by the plaintiff that the defendant had been involved or mixed up with the tortious acts alleged by the plaintiff. There was nothing in the plaintiff's affidavit to show that the defendant was linked to or involved or had anything to do with any of the alleged transactions by the directors of the company. Even assuming that

the defendant was under a moral duty to provide the information sought for, the mere act of refusal on their part should not be regarded as tantamount to being mixed up in the tortious acts of the former directors so as to facilitate their alleged wrongdoings. Such a mere act of refusal, by itself, did not bring the present case within the ambit of the *Norwich Pharmacal* principle (see pp 460F, 463E–F). A B

(3) It was clear from the exhibits, in particular, the various directors' circular resolutions signed by the directors and the company searches, that the plaintiff had knowledge as to which directors (the alleged perpetrators) were responsible for the alleged wrongdoings. The relevant question was whether the defendant/auditor ever got mixed up in the (alleged) tortious act of the directors so as to facilitate their (the directors) own wrongdoing. The court found the answer to be in the negative (see pp 463G–H, 464B–C). C

[Bahasa Malaysia summary D

Syarikat plaintif, Tat Sang Sdn Bhd ('Tat Sang'), telah diletak dalam kuasa penerima oleh Affin Bank Bhd. Defendant adalah juruaudit Tat Sang sejak 1998 dan telah menyediakan satu audit khas tentang Tat Sang bagi tempoh setakat 30 Jun 2001. Apabila Tat Sang telah diletakkan dalam kuasa penerima pada bulan Oktober 2001, penerima-penerima dan pengurus-pengurus telah menulis kepada defendan/juruaudit meminta sesalinan laporan audit khas tersebut tetapi defendan enggan berbuat demikian, dengan menyatakan bahawa laporan tersebut adalah rahsia dan bahawa penerima-penerima dan pengurus-pengurus tersebut tidak berhak terhadapnya. Oleh itu, penerima-penerima dan pengurus-pengurus tersebut telah memohon satu perintah agar defendan mengemukakan semua dokumentasi, kertas-kertas kerja dan nota-nota berkaitan dengan akaun yang telah diauditkan bagi tempoh setakat 30 Julai 1998, 30 Julai 1999 dan 30 Julai 2000 dan audit khas tersebut bagi tempoh setakat 30 Julai 2001. Permohonan oleh plaintif adalah berdasarkan prinsip-prinsip dalam *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1973] 2 All ER 943. E F G

Diputuskan, menolak permohonan tersebut dengan kos:

(1) Prinsip *Norwich Pharmacal*, yang digunakan oleh Mahkamah Agong dalam *First Malaysia Finance Bhd v Dato' Mohd Fathi bin Haji Ahmad* [1993] 2 MLJ 497, menyatakan bahawa 'discovery to find the identity of a wrongdoer is available against anyone whom the plaintiff has a cause of action in relation to the same wrong. It is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession.' (oleh Lord Reid in *Norwich Pharmacal*) (lihat ms 461D–E). Pengecualiannnya adalah jika H I

bukan melalui perbuatan beliau sendiri, seseorang itu telah melibatkan dirinya dalam perbuatan-perbuatan orang lain yang bersifat tort bagi memudahkan perbuatan salah mereka, walaupun beliau tidak mungkin mengakibatkan apa-apa liabiliti peribadi, beliau masih mempunyai satu kewajipan di sisi undang-undang untuk membantu orang yang berlaku kesalahan tersebut dengan memberikan beliau maklumat penuh dan mendedahkan identiti pesalah-pesalah tersebut (lihat ms 461E–F).

(2) Sifat permohonan plaintif bukan dalam lingkungan prinsip *Norwich Pharmacal.* Ia tidak dibuktikan oleh plaintiff yang defendan terlibat dalam perbuatan-perbuatan bersifat tort sebagaimana yang dikatakan oleh plaintif. Tiada apa dalam afidavit plaintif yang menunjukkan bahawa defendan mempunyai kaitan atau terlibat atau mempunyai apa-apa kaitan dengan apa-apa transaksi yang dikatakan oleh pengarah-pengarah syarikat tersebut. Walaupun dengan mengandaikan bahawa defendan mempunyai kewajipan moral untuk memberikan maklumat yang dicari, hanya dengan keengganan di pihak mereka tidak sepatutnya dianggap sama seperti terlibat dalam perbuatan-perbuatan bersifat tort pengarah-pengarah tersebut yang memudahkan perbuatan salah yang dikatakan telah dilakukan oleh mereka. Hanya dengan keengganan mereka, dengan sendirinya, tidak menjadikan kes sekarang ini terlingkung di bawah prinsip *Norwich Pharmacal* (lihat ms 460F, 463E–F).

(3) Adalah jelas daripada ekshibit-ekshibit, terutamanya resolusi pengarah-pengarah yang ditandatangani oleh pengarah-pengarah dan carian-carian syarikat, bahawa plaintif mempunyai pengetahuan pengarah mana (pelaku-pelaku yang dikatakan) yang bertanggungjawab terhadap kesalahan-kesalahan yang dikatakan. Persoalan yang relevan adalah sama ada defendan/juruaudit tersebut pernah terlibat dalam perbuatan pengarah-pengarah bersifat tort (seperti yang dikatakan) bagi memudahkan perbuatan salah mereka sendiri (pengarah-pengarah tersebut). Mahkamah mendapati jawapannya negatif (lihat ms 463G–H, 464B–C).]

Notes

For cases on application for production of documents, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2057–2062.

Cases referred to

First Malaysia Finance Bhd v Dato' Mohd Fathi bin Haji Ahmad [1993] 2 MLJ 497 (folld)

Norwich Pharmacal Co v Commissioners of Customs and Excise [1973] 2 All ER 943 (folld)

Teoh Peng Phe v Wan & Company [2001] 5 MLJ 149 (refd)

Gideon Tan (*Gideon Tan Razali Zaini*) for the plaintiff.
YB Cheong (*Prasad Abraham & Assoc*) for the defendant

Mohd Hishamudin J: The plaintiff company, Tat Sang Sdn Bhd ('Tat Sang') was placed under receivership by Affin Bank Bhd pursuant to a debenture on 16 October 2001.

The defendant is a firm of auditors and has been the auditor for Tat Sang since about 1998. The defendant was commissioned by the board of directors of Tat Sang to carry out and had done a special audit on Tat Sang for the period ending 30 June 2001. It is not clear from the affidavits as to when exactly the defendant was commissioned by the board of directors of Tat Sang to carry out the special audit, but it must have been some time after 30 June 2001. The receivers and managers of Tat Sang, upon taking receivership, have been unable to obtain the books and accounting records of Tat Sang from the former directors of the company. When Tat Sang was placed under receivership in October 2001, the receivers and managers wrote to the defendant/auditor to request a copy of the special audit report, but the defendant refused to accede to the request. The reasons given for the refusal were that the report was confidential and that, in any case, the receivers and managers were not entitled to the same. Hence, the receivers and managers, in the name of Tat Sang, as plaintiff, filed the present originating summons. They seek an order of this court to effect the defendant to provide the plaintiff inspection and to supply copies of all documentation, working papers and notes pertaining to the audited accounts for the periods ending 30 July 1998, 30 July 1999 and 30 July 2000 and the special audit for the period ending 30 June 2001.

This application by the plaintiff, seeking discovery against the defendant, is based on the *Norwich Pharmacal* principle (*Norwich Pharmacal Co v Commissioners of Customs and Excise* [1973] 2 All ER 943).

I had on 28 March 2002 dismissed the application with costs and I shall now proceed to give my grounds.

I am of the view that the nature of the plaintiff's application does not come within the ambit of the *Norwich Pharmacal* principle. I so hold for two reasons.

First, it has not been established by the plaintiff that the defendant has been involved or mixed up with the tortious acts alleged by the plaintiff.

In *Norwich Pharmacal*, Lord Reid explained the scope of the principle as follows at p 948:

> My noble and learned friends. Lord Cross of Chelsea and Lord Kilbrandon, have dealt with the authorities. They are not very satisfactory, not always easy to reconcile and in the end inconclusive. On the whole, I think they favour the appellants, and I am particularly impressed by the views expressed by Lord Romilly MR and Lord Hatherley LC in *Upmann v Elkan* (1871) LR 12 Eq 140, 7 Ch App 130. They seem to me to point to a very reasonable principle that if through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate their own wrongdoing, he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense, the person seeking the information ought to

reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

In the same case, Lord Morris of Borth-Y-Gest, in explaining the application of the principle said at p 951:

> It is not suggested that in ordinary circumstances a court would require someone to impart to another some information which he may happen to have and which the latter would wish to have for the purpose of bringing some proceedings. At the very least, the person possessing the information would have to have become actually involved (or actively concerned) in some transactions or arrangements as a result of which he has acquired the information.

The *Norwich Pharmacal* principle was adopted by our Supreme Court in *First Malaysia Finance Bhd v Dato' Mohd Fathi bin Haji Ahmad* [1993] 2 MLJ 497. There, Edgar Joseph Jr SCJ, in delivering the decision of the Supreme Court, said at p 503:

> Lord Reid reiterated the general rule that discovery to find the identity of the wrongdoer is available against anyone with whom the plaintiff has a cause of action in relation to the wrong. This is how his Lordship put it:
>
> > 'So, discovery to find the identity of a wrongdoer is available against anyone whom the plaintiff has a cause of action in relation to the same wrong. It is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession.'

To the general rule aforesaid, there is, however, an exception exemplified by *Norwich Pharmacal*, the exception being that if, through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, whilst he may incur no personal liability, he is under a legal duty to assist the person who has been wronged by giving him full information and in making disclosure of the identity of the wrongdoers. In the words of Lord Reid at p 505:

> My noble and learned friends, Lord Cross of Chelsea and Lord Kilbrandon, have dealt with the authorities. They are not very satisfactory, not always easy to reconcile and in the end inconclusive. On the whole, I think they favour the appellants, and I am particularly impressed by the views expressed by Lord Romilly MR and Lord Hatherley LC in *Upmann v Elkan* (1871) LR 12 Eq 140; 7 Ch App 130. They seem to me to point to a very reasonable principle that if through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate their own wrongdoing, he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense, the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

At a later part of the judgment, the Supreme Court defined the scope of the *Norwich Pharmacal* principle as follows at p 506:

> In our view, there can be no doubt that *Norwich Pharmacal* is in effect a consolidation of the early authorities on discovery, which the House had approved. We also note that the scope of *Norwich Pharmacal* is limited by the 'mere witness' and 'mere tort' rules. We would respectfully follow the principles enunciated by the House of Lords in *Norwich Pharmacal* and it was with those principles in mind that we turned to consider the particular circumstances of the present case in order to decide whether the judge was right in making the order he did in fact make.

Mr Gideon Tan argued that the duties of an auditor want further than merely reporting what had financially transpired; and that, if in the course of auditing the accounts of the company, the auditor were to discover any wrongdoing, then he is under a moral duty to assist Tat Sang by providing full information as to the identity of the wrongdoers (see para (iii) of the grounds in the originating summons). Learned counsel further submits that the auditor, by refusing to provide the plaintiff with the information sought, has facilitated the wrongdoings of the former directors. It is pointed out by Mr Gideon Tan that the alleged refusal to provide the information sought and the alleged wrongdoings are set out in paras 5 and 6(a) and (d) of the plaintiff's affidavit at encl 2. The said para 5 states:

> The defendant had done a special audit on Tat Sang Sdn Bhd for the period ending 30 June 2001. The receivers and managers understand that the draft copy has been sent to the company prior to the receivership. The receivers and managers had requested an additional draft copy of the special audit from the defendant, but the defendant refused to provide it. Now produced and shown to me is a copy of a letter dated 26 October 2001 exhibited hereto and marked as 'KTAK-3'.

Paragraph 6(a) and (d) states:

> The receivers and managers are concerned that assets of the company could have been dissipated by the former directors, and I respectfully state the reasons of belief as follows:
>
> (a) the last audited accounts for Tat Sang Sdn Bhd shown fixed assets amounting to RM11,671,111 and nett current assets amounting to RM25,026,489 as at 31 July 2000. However, it was announced by Tat Sang Holdings Bhd that the company was sold for RM50,000. Now produced and shown to me is a copy of the company's last audited accounts and an article in *The Edge* dated 5 November 2001 collectively exhibited hereto and marked as 'KTAK-4';
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> ...
>
> (d) after receivership, we were also informed by the company secretary on 23 October 2001 of the following:
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> (i) Directors' Circular Resolution dated 15 June 2001 for disposal of fixed assets amounting to RM7,670,474.24;
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> (ii) Directors' Circular Resolution dated 15 June 2001 for bad debts amounting to RM8,589,963.60 written off;
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> (iii) Directors' Circular Resolution dated 15 June 2001 for disposal of stocks and raw materials amounting to RM3,964,335.42;
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> (iv) Directors' Circular Resolution dated 15 June 2001 for stocks amounting to RM3,070,412.28 written off; and

A (v) Directors' Circular Resolution for restructuring agreement dated 30 June 2001.

Now produced and shown to me is a copy of a letter dated 23 October 2001 and the aforesaid resolutions collectively exhibited hereto and marked as 'KTAK-7'. It seemed that these resolution could have been backdated to justify the sale of the company for only RM50,000.

B It is contended by learned counsel that the above affidavit discloses the commission of tortious acts: acts of dissipating the company's assets. And counsel submits that such acts tantamount to a breach of fiduciary duty on the part of the former directors of Tat Sang.

C Without the need to analyze the above mentioned paragraphs of the affidavit and assuming for a moment that tortious acts had in fact been committed by the former directors of Tat Sang, the question arises as to whether the plaintiff in the present case has clearly established that the defendant/auditor had got mixed up in the tortious acts of the former directors so as to facilitate their wrongdoings. In my considered judgment, D the answer must be in the negative. In the case before me, it is not disputed that the defendant, Saw & Company, is an auditor appointed since 1998 to check and audit the accounts of the company (Tat Sang) and that subsequent to 30 June 2001, the board of directors of Tat Sang had commissioned the auditor to carry out a special audit on the financial affairs of the company for the period ending 30 June 2001. However, and E significantly, there is nothing in the plaintiff's affidavit to show that the defendant, by reason of being the auditor of Tat Sang or otherwise, is linked to or involved or had anything to do with any of the alleged transactions by the directors of the company, as set out in the affidavit. Even assuming that the defendant, as the auditor was, as contended, under a moral duty to F provide the information sought for (the special audit report) by the plaintiff, yet I am hesitant to rule that the mere act of refusal on their part should be regarded as tantamount to being mixed up in the tortious acts of the former directors so as to facilitate their alleged wrongdoings. In other words, such a mere act of refusal, by itself, does not bring the present case within the ambit of the *Norwich Pharmacal* principle.

G My second ground in rejecting the present application is this. The purpose of invoking the *Norwich Pharmacal* principle, as explained by the House of Lords (in *Norwich Pharmacal*) and our Supreme Court (in *First Malaysia Finance*), is to enable the party wronged to identify the alleged wrongdoers. In the present case, however, it is clear from the exhibits, in particular, the various directors' circular resolutions signed by the directors H and the company searches, that the plaintiff has knowledge as who the directors (the alleged perpetrators) were that were responsible for alleged wrongdoings.

In coming to my decision in the present case, I have had the benefit of reading the unreported judgment of Kang Hwee Gee J in *Teoh Peng Phe v* I *Wan & Co* in the Kuala Lumpur High Court (Commercial Division) Suit No D5–24–339–1999 (now reported at [2001] 5 MLJ 149), which was brought to my attention by Mr Gideon Tan. In that case, the learned judge,

in his learned judgment, had posed this question:

> Are the auditors under a moral duty to provide the information and the identity of the wrongdoers?

Based on the evidence before the learned judge, his Lordship answered the question posed in the affirmative. And this factor appears to have been material in coming to the decision that his Lordship made.

With respect, in the present case before me, however, I am of the view that such a question is irrelevant in the context of the *Norwich Pharmacal* principle. To my mind, the relevant question is whether the defendant/auditor ever got mixed up in the (alleged) tortious act of the directors so as to facilitate their (the directors) own wrongdoing?

Based on the available evidence, I have already answered this question in the negative.

Accordingly, this application is dismissed with costs.

Application dismissed with costs.

Reported by Chew Phye Aun